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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **MAY 08 2009**
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

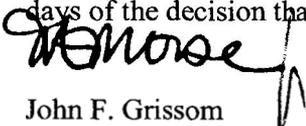
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Acting Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a shipping and cargo line. It seeks to employ the beneficiary permanently in the United States as an application developer. As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a U.S. bachelor's degree or foreign degree equivalent required by the terms of the labor certification application and the professional regulation.

On appeal, counsel asserts that the beneficiary's bachelor of science degree from Bangalore University in India is equivalent to a four-year bachelor of science degree from an accredited United States university. Counsel submits on appeal evaluations from [REDACTED] of Career Consulting International and [REDACTED] of Marquess Educational Consultants. Both evaluations equate the beneficiary's three-year degree with a four-year Bachelor of Science in Computer Science from an accredited college or university in the United States. Counsel further asserts that the United Nations Educational Scientific and Cultural Organization (UNESCO) recommends that a three-year Indian degree should be treated as equivalent to a United States bachelor's degree and that since the United States and India are members of UNESCO, the United States should recognize an Indian three-year bachelor's degree as the foreign equivalent to a United States bachelor's degree.⁴ Counsel also notes that many United States universities allow graduates of three-year Indian degree programs to qualify to enter their master's degree programs. Counsel

¹ After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

² [REDACTED] indicates that she has a Master's degree from the Institute of Transpersonal Psychology and a doctorate from Ecole Superieure Robert de Sorbon but does not indicate the field in which she obtained her doctorate. According to its website, www.sorbon.fr/index1.html, Ecole Superieure Robert de Sorbon awards degrees based on past experience.

³ [REDACTED] indicates he has a "canonical diploma of Sacrae Theologiae Professor" from St. David's Oecumenical Institute of Divinity, which he equates to a Doctorate of Divinity.

⁴ UNESCO has six regional conventions on the recognition of qualifications, and one interregional convention. A UNESCO convention on the recognition of qualifications is a legal agreement between countries agreeing to recognize academic qualifications issued by other countries that have ratified the same agreement. While India has ratified one UNESCO convention on the recognition of qualifications (Asia and the Pacific), the United States has ratified none of the UNESCO conventions on the recognition of qualifications. In an effort to move toward a single universal convention, the UNESCO General Conference adopted a Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. The United States was not a member of UNESCO between 1984 and 2002, and the Recommendation on the Recognition of Studies and Qualifications in Higher Education is not a binding legal agreement to recognize academic qualifications between UNESCO members. See <http://www.unesco.org> (accessed April 13, 2009). UNESCO does not establish that the beneficiary's degree is equivalent to a U.S. bachelor's degree.

states that United States Citizenship and Immigration Services (USCIS) “routinely approves evaluations of three year Bachelor of Science degrees being equivalent to four year B.S. degrees if the degree is from England.”⁵

In response to a request for evidence (RFE) dated November 4, 2008 from the AAO, counsel states that the petitioner’s Form I-140 petition was submitted for both the professional and the skilled worker classifications, and he urges the AAO to consider the petition under the skilled worker classification. Counsel asserts that the petitioner’s labor certification requirements include “B.S. [in Comp. Sci., Comp. Apps., Physics, Engineering, Electronics or related quantitative field] or equiv. combo of work exp & edu., &/or exp in any above or similar positions.” Counsel states that the petitioner’s recruitment efforts reflected these requirements. He asserts that by marking ‘xx’ under number of years of college education on Form ETA 750, the petitioner meant that the position is not limited only to candidates who have a three-year or four-year bachelor’s degree. He also asserts that DOL, not USCIS, has the authority to interpret the credentials required for the employment it has certified.

For the reasons discussed below, we find that decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the job offered.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The proffered position requires a bachelor’s degree in the major field of study of computer science, computer applications, engineering, electronics or physics, and two years of experience in the job offered or two years of experience as a programmer analyst. Because of those requirements, the proffered position is for a professional. As noted by counsel in response to the AAO’s RFE, DOL assigned the occupational code of 030.062-010, to the proffered position. DOL’s occupational codes are assigned based on normalized occupational standards. According to DOL’s public online database at <http://online.onetcenter.org/link/summary/15-1031.00> (accessed February 23, 2009) and its extensive description of the position and requirements for the position most analogous to the petitioner’s proffered position, the position falls within Job Zone Four requiring “considerable preparation” for the occupation type closest to the proffered position. According to DOL, two to

⁵ USCIS, through the AAO, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means “[m]ost of these occupations require a four-year bachelor’s degree, but some do not.” *See id.* Additionally, DOL states the following concerning the training and overall experience required for these occupations:

A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

The proffered position could also be properly analyzed as a skilled worker since the normal occupational requirements do not always require a bachelor’s degree but a minimum of two to four years of work-related experience. Therefore, USCIS will also examine the petition under the skilled worker category, which requires a showing that the alien has two years of training or experience and meets the specific education, training, and experience terms of the job offer on the alien labor certification application.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following for the professional category:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

While no degree is required for the skilled worker classification, the regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary “meets the education, training or experience, and any other requirements of the individual labor certification.”

The issue before us is whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification. The regulations specifically require the submission of such evidence for this classification. 8 C.F.R. § 204.5(l)(3)(B) (“the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification”). As noted above, the ETA 750 in this matter is certified by DOL.

The beneficiary possesses a foreign three-year bachelor's degree and a Certificate in Computing from the Indira Gandhi National Open University in India. Thus, the issues are whether that degree is a foreign degree equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary's Certificate in Computing from the Indira Gandhi National Open University in addition to that degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Authority to Evaluate Whether the Alien is Eligible for the Classification Sought

As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

(1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and

(2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." In order to have experience and education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Because the beneficiary does not have a “United States baccalaureate degree or a foreign equivalent degree,” the beneficiary does not qualify for preference visa classification under section 203(b)(3) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor’s degree.

Authority to Evaluate Whether the Alien is Qualified for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL’s role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS’s decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (“DOL”) must certify that insufficient domestic workers are available to perform the job and that the alien’s performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien’s entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005), which finds that United States Citizenship and Immigration Services (USCIS) “does not have the authority or expertise to impose its strained definition of ‘B.A. or equivalent’ on that term as set forth in the labor certification.” In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* at *8 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, CV 06-65-MO (D. Ore. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a ‘B.S. or foreign equivalent.’ The district court determined that ‘B.S. or foreign equivalent’ relates solely to the alien’s educational background, precluding consideration of the alien’s combined education and work experience. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word ‘equivalent’ in the employer’s educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer’s intent. *Snapnames.com, Inc.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner’s intent regarding educational equivalence is clearly stated and does not include alternatives to a bachelor’s degree.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, “Offer of Employment,” describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual

business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A, Item 14 of the labor certification reflects the following requirements:⁶

| | |
|-------------------------------|--|
| Grade School | <u>XX</u> |
| High School | <u>XX</u> |
| College | <u>XX</u> |
| College Degree Required | <u>Bachelors Degree</u> |
| Major Field of Study | <u>Comp. Sci., Comp. Apps., Engin., Electronics, Physics</u> |
| Training | [all information blocks under 'training' are lined out] |
| Experience | |
| Job Offered, Yrs./Mos. | <u>2/0</u> |
| Related Occupation, Yrs./Mos. | <u>2/0</u> |
| Related Occupation, (specify) | <u>Programmer Analyst</u> |

The beneficiary possesses a foreign three-year Bachelor of Science degree in Physics, Mathematics and Computer Science attained by three years of university-level credit from Bangalore University in India. The beneficiary also received a Certificate in Computing from the Indira Gandhi National Open University in India.

With the petition, the petitioner submitted an education evaluation report from [REDACTED], Atlanta, Georgia; written by [REDACTED] dated March 17, 1999. The evaluation states that the beneficiary obtained a three-year Bachelor of Science degree in physics, mathematics and computer science from Bangalore University in India in 1996 and that the above degree is equivalent

⁶ Despite counsel's assertion to the contrary, Item 14 is read cumulatively (e.g., an employer is requiring that applicants for the job possess X years' education, plus X years' training, plus X years' experience). However, in the experience portion of item 14, the two blocks captioned "Job Offered"/"Related Occupation" are read as alternatives. In the instant case, the petitioner required on Form ETA 750 that an applicant for the proffered position have a college Bachelor's degree in the major field of study of computer science, computer applications, engineering, electronics or physics, plus two years of experience in the job offered or two years of experience as a programmer analyst. The clear language of the petitioner's ETA 750 does not allow an applicant to substitute a combination of education and work experience, a combination of lesser diplomas or degrees, or work experience alone, for the stated requirements. The regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in the skilled worker classification "must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification." Thus, despite counsel's assertion that the petitioner intended to accept either a bachelor's degree or related professional experience and that its recruitment reflected this intent, the plain language of the labor certification application does not provide for such alternatives.

to three years of coursework towards a Bachelor of Science degree in computer science from an accredited university in the United States. The evaluation further states that the beneficiary was awarded a Certificate in Computing from the Indira Gandhi National Open University in India in 1998 and opines that the diploma could be equated to one semester of coursework towards a Bachelor of Science degree in computer science from an accredited university in the United States.

Therefore based upon the evaluation from [REDACTED] of the beneficiary's combined educational achievements, the beneficiary has the equivalent of three and one-half years of equivalent coursework towards a Bachelor of Science degree from an accredited college or university in the United States.⁷

In response to the director's request for evidence dated October 20, 2006, the petitioner submitted an evaluation from the Trustforte Corporation. This evaluation equates the beneficiary's three-year degree from Bangalore University with three years of study towards a Bachelor of Science degree at an accredited college or university in the United States. The evaluation then concludes that the beneficiary's Certificate in Computing from the Indira Gandhi National Open University, in combination with the beneficiary's three-year degree, equates to a Bachelor of Science degree in computer science.

The record also contains evaluations from [REDACTED] of Career Consulting International and [REDACTED] of Marquess Educational Consultants. Both evaluations equate the beneficiary's three-year degree with a four-year Bachelor of Science in Computer Science from an accredited college or university in the United States. The evaluations of record are not consistent. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Counsel states in response to the AAO's RFE that the evaluations differ because the evaluation from [REDACTED] was prepared on the basis of number of years the degree took to complete, while the evaluations from Career Consulting International and Marquess Educational Consultants were prepared on the basis of an actual course-by-course analysis, analysis of school courses and number of classroom hours it took the beneficiary to graduate from Bangalore University.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is

⁷ The evaluation further states that the beneficiary "has extensive experience in software engineering, system analysis and computer program design and development over a period of three years" and equates this experience with one year of university-level credit. The evaluation used the rule to equate three years of experience for one year of education, but that equivalence applies to nonimmigrant H-1B petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

⁸ *See supra* note 2.

⁹ *See supra* note 3.

ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

Moreover, to determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Once again, we are cognizant of the recent holding in *Grace Korean*, which held that USCIS is bound by the employer's definition of "bachelor or equivalent." In reaching this decision, the court concluded that the employer in that case tailored the job requirements to the employee and that DOL would have considered the beneficiary's credentials in evaluating the job requirements listed on the labor certification. As stated above, the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, but the analysis does not have to be followed as a matter of law. *K.S.* 20 I&N Dec. at 719. In this matter, the court's reasoning cannot be followed as it is inconsistent with the actual practice at DOL. Additionally, in this case, the petitioner failed to require an equivalency as an express term on the labor certification application.

As discussed above, the role of the DOL in the employment-based immigration process is to make two determinations: (i) that there are not sufficient U.S. workers who are able, willing, qualified and available to do the job in question at the time of application for labor certification and in the place where the alien is to perform the job, and (ii) that the employment of such alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act. Beyond this, Congress did not intend DOL to have primary authority to make any other determinations in the immigrant petition process. *Madany*, 696 F.2d at 1013. As discussed above, USCIS, not DOL, has final authority with regard to determining an alien's qualifications for an immigrant preference status. *K.R.K Irvine*, 699 F.2d at 1009 FN5 (*citing Madany*, 696 F.2d at 1011-13). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by DOL. *Id.*

Specifically, as quoted above, the regulation at 20 C.F.R. § 656.21(b)(6) requires the employer to "clearly document . . . that all U.S. workers who applied for the position were rejected for lawful job related reasons." BALCA has held that an employer cannot simply reject a U.S. worker that meets

the minimum requirements specified on the Form ETA-750. See *American Café*, 1990 INA 26 (BALCA 1991), *Fritz Garage*, 1988 INA 98 (BALCA 1988), and *Vanguard Jewelry Corp.* 1988 INA 273 (BALCA 1988). Thus, the court's suggestion in *Grace Korean* that the employer tailored the job requirements to the alien instead of the job offered actually implies that the recruitment was unlawful. If, in fact, DOL is looking at whether the job requirements are unduly restrictive and whether U.S. applicants met the job requirements on the Form ETA 750, instead of whether the alien meets them, it becomes immediately relevant whether DOL considers "B.A. or equivalent" to require a U.S. bachelor degree or a foreign degree that is equivalent to a U.S. bachelor's degree. We are satisfied that DOL's interpretation matches our own. In reaching this conclusion, we rely on the reasoning articulated in *Hong Video Technology*, 1998 INA 202 (BALCA 2001). That case involved a labor certification that required a "B.S. or equivalent." The Certifying Officer questioned this requirement as the correct minimum for the job as the alien did not possess a Bachelor of Science degree. In rebuttal, the employer's attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work experience and formal education. The Certifying Officer concluded that "a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers." BALCA concluded:

We have held in *Francis Kellogg, et als.*, 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998 (en banc) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chose to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 65[6].21(b)(5).

In as much as Employer's stated minimum requirement was a "B.S. or equivalent" degree in Electronic Technology or Education Technology and the Alien did not meet that requirement, labor certification was properly denied.

Significantly, when DOL raises the issue of the alien's qualifications, it is to question whether the Form ETA-750 properly represents the job qualifications for the position offered. DOL is not reaching a decision as to whether the alien is qualified for the job specified on the Form ETA 750, a determination reserved to USCIS for the reasons discussed above. Thus, DOL's certification of an application for labor certification does not bind us in determinations of whether the alien is qualified for the job specified. As quoted above, DOL has conceded as much in an amicus brief filed with a federal court. If we were to accept the employer's definition of "or equivalent," instead of the definition DOL uses, we would allow the employer to "unlawfully" tailor the job requirements to the alien's credentials after DOL has already made a determination on this issue based on its own definitions. We would also undermine the labor certification process. Specifically, the employer could have lawfully excluded a U.S. applicant that possesses experience and education "equivalent" to a degree at the recruitment stage as represented to DOL.

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification application form].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

While we do not lightly reject the reasoning of a District Court, it remains that the *Grace Korean* and *Snapnames* decisions are not binding on us, runs counter to Circuit Court decisions that are binding on us, and is inconsistent with the actual labor certification process before DOL. Thus, we will maintain our consistent policy in this area of interpreting “or equivalent” as meaning a foreign equivalent degree. Further, because the ETA 750 does not contain “or equivalent” language, we cannot determine that the petitioner’s intent was to accept something less than a bachelor’s degree.

In this case, the instant petition contains a position that qualifies in the skilled worker category. The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

As noted previously, the certified Form ETA 750 requires a bachelor’s degree in the major field of study of computer science, computer applications, engineering, electronics or physics, and two years of experience in the job offered or two years of experience as a programmer analyst. The singular degree

requirement is not applicable to skilled workers and the regulation governing skilled workers only requires that the beneficiary meet the requirements of the labor certification in addition to showing qualifying employment experience. The labor certification in this case does not permit alternatives to a U.S. bachelor degree such as a three year bachelor's degree and a Certificate in Computing. Additionally, in response to the AAO's RFE, the petitioner submitted its notice of posting for the proffered job. The notice does not instruct applicants that the petitioner will accept alternatives to a U.S. bachelor's degree.¹⁰ The petitioner has not clearly demonstrated that U.S. workers without bachelor's degrees were in fact put on notice that they were eligible to apply for the proffered position, despite the stated requirements of the Form ETA 750, and that the petitioner did not in fact exclude U.S. workers with qualifications similar to those of the beneficiary from applying for and filling the position.¹¹ The AAO finds that the beneficiary does not meet the educational requirements specifically set forth on the certified labor certification in the instant case.

Further, beyond the decision of the director, the petitioner has not established that the beneficiary obtained two years of qualifying work experience prior to the priority date. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). With the petition, the petitioner submitted a letter dated November 7, 1997 from [REDACTED] Project Manager of Uttara Software, indicating that the beneficiary has worked on various projects in the platform of Oracle since May 1996. The letter does not list an address for Uttara Software, does not list the beneficiary's job title, does not confirm the beneficiary's full-time employment, and does not list duties that correspond with the proffered job or the position of programmer analyst. This work does not qualify the beneficiary for the proffered position. The petitioner also submitted a letter dated January 10, 2001 from [REDACTED] Assistant General Manager-Human Resources of Kumaran Systems Private Limited, indicating that the beneficiary "has been associated with us as a Technical Consultant from November 10, 1997 to December 5, 2000." The letter does not confirm the beneficiary's full-time employment and does not list duties that correspond with the proffered job or the position of programmer analyst. This work does not qualify the beneficiary for the proffered position.

The petitioner also submitted a letter dated March 22, 2002 from [REDACTED] Vice President of SoftLabs, Inc., indicating that the beneficiary "has been an employee of our organization since January 2001." The letter further states that the beneficiary was assigned to a project with the petitioner as a Programmer Analyst. The letter does not confirm the beneficiary's two years of full-time experience in the job offered or two years of experience as a programmer analyst. The petitioner confirmed in a letter submitted with the petition that the beneficiary has been employed by the

¹⁰ Conversely, the petitioner's newspaper advertisements for the proffered position allow for alternatives to a U.S. bachelor's degree.

¹¹ Under DOL's regulations, it is the responsibility of USCIS to ensure that the labor market test was *in fact* carried out in accordance with applicable law. *See* 20 C.F.R. § 656.30(d).

petitioner in the proffered position since March 2002. Even if we accept the letters from SoftLabs and the petitioner as evidence of the beneficiary's prior qualifying experience, because the letters from Soft Labs and the petitioner do not verify the dates in January 2001 and March 2002 that the beneficiary began work, the petitioner has not established that the beneficiary obtained two years of qualifying work experience prior to the priority date on January 23, 2003.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.